

Before the
 Federal Communications Commission
 Washington, D.C. 20554
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DISPATCHED BY
 MM Docket No. 93-233

In the Matter of

Amendment of Section 76.51
 of the Commission's Rules
 to Include Pine Bluff,
 Arkansas, in the Little Rock,
 Arkansas, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: August 9, 1993; Released: August 19, 1993

Comment Date: September 23, 1993
 Reply Comment Date: October 8, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed May 6, 1993, by Agape Church, Inc. ("Agape" or "Petitioner"), licensee of television station KVTN, Channel 25 (Independent), Pine Bluff, Arkansas, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Little Rock, Arkansas television market to "Little Rock-Pine Bluff, Arkansas." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).¹

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. See 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact,

compete with all stations licensed to such communities. See *CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."²

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),³ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. See Section 614(f) of the Act.⁴ The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rule making procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In support of its request, Agape states that the subject market consists of two major population centers, Little Rock and Pine Bluff, with the community of Pine Bluff approximately 30 air miles southeast of Little Rock. It notes that there are five stations licensed to Little Rock -- KETS, Channel 2; KARK, Channel 4; KATV, Channel 7; KTHV, Channel 11; and KLRT, Channel 16 -- and two stations licensed to Pine Bluff -- KVTN, Channel 25, and KASN, Channel 38. The Petitioner states that both KVTN and KASN place a Grade B signal over Little Rock, and that both Pine Bluff television stations "substantially overlap the coverage areas of the five television stations which

¹ The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." See *Report and Order* in MM Docket No. 92-259, *supra*, at 2977-78, n.150 (1993).

² See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). See, also, *Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

³ Cable Television Consumer Protection and Competition Act,

Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴ In connection with the implementation of the broadcast signal carriage ("must-carry") provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis, delegating authority to act on such petitions to the Chief, Mass Media Bureau. See *Report and Order* in MM Docket No. 92-259, *supra*.

are licensed to Little Rock."⁵ Agape further asserts that Pine Bluff is included by Arbitron in the Little Rock Area of Dominant Influence (ADI), the Little Rock Survey Area and the Little Rock Metro Rating Area. From these facts, Agape states that all the stations licensed to communities in the market compete for audience and economic support throughout the Little Rock market.

6. The gravamen of Agape's petition is that although the Pine Bluff and Little Rock stations are unavoidably competitive throughout the market area, amendment of the Commission's Rules as proposed is essential to reflect market realities and to equalize competition among the stations. Specifically, it states that while KVTN is entitled to carriage on Little Rock ADI cable systems under the Commission's new must-carry rules,⁶ because Pine Bluff is not a designated community in the Section 76.51 market listings, the station would be considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.⁷ As a result, Agape states that it has already received notifications by several Little Rock-area cable systems that they will not carry the station due to the increased copyright liability attendant to the carriage of a "distant signal."⁸

7. Inasmuch as market hyphenations are "based on the premise that stations licensed to any of the named communities [within a designated market] do, in fact, compete with all stations licensed to such communities," the Petitioner states that it meets all the criteria for the requested amendment of Section 76.51. In addition to the competitive nature of the market, Agape states that the proposed hyphenation of the market will not extend the cable carriage of KVTN substantially beyond the station's Grade B contour. It alleges that "the principal Little Rock-area cable systems that would be affected by the rule change are within KVTN's Grade B contour . . . [with] the only significant exception [being] a cable system . . . just slightly beyond Station KVTN's Grade B contour." Moreover, in addition to its particularized need to equalize competition in the market, Agape asserts that the public will benefit from its proposal because Little Rock-area cable systems will be able to carry the station's diversified, independent programming.

DISCUSSION

8. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that Station KVTN and stations licensed to communities in the Pine Bluff and Little Rock television markets do compete for audiences and advertisers throughout much of the pro-

posed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Petitioner's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **September 23, 1993**, and reply comments on or before **October 8, 1993**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few television licensees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

⁵ The Petitioner states that the coverage of the Little Rock area by the Pine Bluff stations results, in part, because their transmitters are located approximately half way between the two cities and in close proximity to Little Rock station KATV.

⁶ See Section 76.56(b) of the Commission's Rules.

⁷ Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Pine Bluff as a designated community in this market list results in KVTN's classification as a "distant signal" for market-area cable systems more than 35 miles from Pine Bluff.

⁸ Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. See *Report and Order* in MM Docket No. 92-259, *supra*, at 2973-74.

Additional Information

12. For additional information on this proceeding, contact James A. Hudgens, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau